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Supreme Court of the United States

October Term, 1946

No. 989

HAL PETERSON, CHARLES PETERSON, TAYLOR CUMMINS, J. C. CUMMINS, KATHRYN M. BECK, and C. D. BECK, d.b.a. C. D. BECK & COMPANY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN SUPPORT THEREOF

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Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

This petition of Hal Peterson, Charles Peterson, Taylor Cummins, J. C. Cummins, Kathryn M. Beck, and C. D. Beck, doing business as C. D. Beck & Company respectfully prays this Honorable Court that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit affirming an order of the National Labor Relations Board entered against Petitioners ordering them to cease and desist certain acts and to take affirmative action by rehiring two employees and giving them back pay.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 157 F. (2d) 514 [157 F. (2d) advance sheet No. 7, Dec. 2, 1946].

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *NLRB* v. *Montgomery Ward & Co.* is reported in 157 F. (2d) 486 (same advance sheet as above).

Petitioners contend that there is a conflict between these two decisions. The National Labor Relations Board did not appeal the *Montgomery Ward* case and the time therefor has now elapsed.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 16, 1946 (R. 413). Petition for Rehearing was denied December 2, 1946 (R. 417).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925, now being Section 347(a), Title 28, U. S. Code.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151 et seq.) are set forth in Appendix A, p. 17.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

This case was presented to the court below upon Petition of the National Labor Relations Board pursuant to Section 10-e of the National Labor Relations Act [29 U. S. C. A. § 160(e)] for enforcement of its order issued against Petitioners on October 4, 1945 (R. 47) following the usual Board proceedings under Section 10 of the Act.

The court below affirmed the Board's findings and ordered the enforcement of the Board's order as prayed on October 16, 1946, and denied Petitioners' petition for rehearing on December 2, 1946.

Union activity began among the employees of petitioner's plant located at Sidney, Ohio, early in June, 1944. On June 27, 1944, the union organizer mailed the usual demands for collective bargaining rights to petitioner and thereafter Mr. C. D.Beck, Managing Director of the partnership, tried to get together with the organizer for a conference. The organizer was not a resident of Sidney, Ohio, and Mr. Beck experienced considerable difficulty, and about six weeks' delay, in arranging a meeting with the CIO organizer, one Mr. Tull. Because communications to Mr. Tull remained unanswered, Mr. Beck made inquiry among certain of his employees as to where Mr. Tull could be located and to ascertain whether a majority of the employees wanted the union, in which event Mr. Beck told them that he wanted them to organize and get back to normal production. During that time the evidence shows that Mr. Beck was not against the union, but wanted to get production back to normal. On August 3, 1944, a conference was held between Mr. Beck and Mr. Tull in Mr. Beck's office, during which Mr. Beck formed an adverse opinion of Mr. Tull and his objectives, but did not so tell his employees.

On the same day of and following that conference, Mr. Beck called all of the employees together at the time clock before quitting time and made a speech to them and therein commented upon the following matters: the deplorable condition of production; a telegram just received from Colonel Lynn, Chief of Cleveland Ordnance District, which stated that production was "falling behind" and urged the employees to greater effort; the results of the War Labor Board ruling as to wage increases and the possibility of a production bonus as suggested by the War Labor

Board; stated his personal opinion[1] of the CIO union, which was that it was a racket; urged all of the employees to go to a union meeting scheduled to be held that night and to vote one way or another, but to get the question of organization settled, so that the plant could get back to normal production. There was evidence (although contradicted, we assume it to be a fact) that in the speech he asked them to return from the meeting with a "changed mind" and that "Personally he thought they were sticking their necks out if they joined" (Hughes, complainant,[2] R. 105), but there was no further amplification nor any threat of any kind connected therewith. Neither the Board nor the Court below found that there were any actual threats of discharge contained in the speech, but both held that the use of the expressions "changed mind" and "sticking their necks out," violated the Act and that "the reasonable and inevitable inference is that a threat of discharge and discrimination is intended." 157 F. (2d) 514 at 515. These two expressions were contained in a speech of one-half hour's length, during which every witness, whether for the Board or for the company, testified in substance that he had said, "Well, in general, he talked about the incentive plan, and he spoke of the Union in his own opinion, however, that he thought it was a racket, see the CIO. He talked about the efforts he had made to get us a raise through the War Labor Board, and further advised us all to go to the meeting and to listen to Mr. Tull, *and that if*

---

[1] Without exception, every witness, both for the Board and Petitioners, including the two complainants, admitted that Mr. Beck clearly stated during his speech that he was giving only "his opinion" of the Union, *and that the employees could do anything they wanted with regard to joining or not joining the Union.* These statements were so clearly understood and indelibly impressed upon the minds of every employee witness that they clearly recalled them, although the hearing was over five months after the speech was made.

[2] Herein we refer to Mr. Hughes and Mr. Eiler, the discharged employees, as complainants because they were the two complaining witnesses on whose behalf the Board filed charges.

we saw fit in our own mind to sign a card and have an election and vote the Union in, and it would be okay with him'' (Board's witness on direct examination, R. 137, emphasis supplied).

Petitioners contend that even standing alone these expressions are not threats of discrimination or discharge, nor are they a "clear and present danger" (*Thomas* v. *Collins,* 323 U. S. 516). Certainly, when these expressions were stated as personal opinions, they are protected under the right of freedom of speech guaranteed by the First Amendment of the Constitution of the United States as construed in *NLRB* v. *Montgomery Ward & Company,* 157 F. (2d) 486, decided one week after the decision of the court below, and which Petitioners contend is in conflict with the instant case.

Petitioners were engaged in the manufacture of buses, critically needed for the successful prosecution of the war. Materials and component parts of the buses were allocated by the Army, and production was scheduled by the Army.

The fabricated back, sides, front, and top of the buses were put together on four "bucks" which were stands on which they could be held (see picture, R. 405). When in full production the four bucks were continuously occupied. During the latter part of June, all of July, and the first two weeks of August, one of these bucks stood idle a great deal of the time. There were two set-up men, Mr. Hughes and Mr. Eiler, responsible respectively for the fitting together of the back, sides, and top frames. Each of these components was fabricated in skeleton form in another department of the plant. Each of these components was bulky. During the months of July and August, these components were produced so far in advance of the assembly line that they had to be stored along the walls of the plant. Thus it was clear that at the point where Hughes and Eiler

worked there was a bottleneck in production as their set-up work was the first to be performed on the buck assembly line.

During June, July and August, 1944, production slackened, notwithstanding a substantial increase of manpower from January 1st to July 6th and up to August 14th (59 men to 76 men). During July and August production reached a low point to such an extent that it became a matter of concern to the Army. Representatives of the Army took affirmative steps and advised Mr. Beck procedures to follow in the hope that production would promptly return to normal. Among other suggestions, an Ordnance official, after a study of the situation in the plant, told Mr. Beck: "You are operating a business and you know there is only one thing you can do, and that is go out there and pick out the fellows that you know are actually holding her up, and fire them" (R. 233). The evidence clearly discloses, and there is no substantial evidence to the contrary, that three of the employees were determined to be the cause of the slowdown in production, so that on August 14, 1944 (12 days *after* the speech), they were discharged. Two of the three were Mr. Eiler and Mr. Hughes, and the Board ordered these two reinstated with back pay. The third was named Staley, but the Board did not see fit to file charges as to his discharge. He was a new employee employed as a sheet metal paneler helper and worked in the same department as Hughes and Eiler.

In the Board's findings, and based upon inferences from unsubstantial testimony, it attempted to excuse the slowdown of production by placing the blame on the work done on a wrecked bus then being repaired in the plant during July and August. It does not comment upon the undisputed testimony that another wrecked bus was being repaired when production was at its highest point for the entire year during April and May (R. 256, 407). Nor does it

comment upon the undisputed testimony that during November and December, when production was again up to normal, a third wrecked bus was in the plant for repair. That bus was in the plant during the trial of this case. The Board ignores the undisputed testimony that no production workers were taken from regular work to do this repair work and the statement of Hughes on direct examination, "Well, just now and then, why, somebody would work on it a little bit" (R. 119). Furthermore it ignores the undisputed fact that employment increased substantially during the year, from 59 employees in January to 72 employees on June 1st, and 76 employees on July 6th (R. 266), and thus continued up to August 14th.

It is significant to note that complainants Hughes and Eiler attempted to excuse their slack production because of the fact the wrecked bus was in the plant during June and July. From records it was undisputed that Hughes spent absolutely no time on the wrecked bus during these months (R. 352), and that Eiler spent 7½ hours, divided among three days, in June, and absolutely no time on it during July and August (R. 352). Thus we find the Board making findings based on an inference upon insubstantial proof which is contradicted by undisputed record evidence.

Hughes was discharged for deliberately slowing down production for which he was warned and punished prior to discharge. Eiler was discharged because he had the worst absentee record in the shop, and the Board was forced to find, "It is evident that Eiler was frequently absent, a practice that had extended over several months" (R. 29). The third man, Staley, was discharged because of his loud and argumentative manner, which seriously interfered with his own as well as other workers' production. (No issue is here involved as to this man since no charges were filed.) After the replacement of these three individuals and when the new untrained men became qualified, production returned to normal.

The day after the speech, Mr. Beck called to his office one man from each department and explained to them the proposed production bonus. They suggested a poll of all employees after the plan was written up and submitted to the men by posting it on the bulletin board. The plan (Ex. 5, R. 409) was so posted on August 4th, and on August 5th, the foremen took the poll by asking each employee his desire. The result was overwhelmingly, if not unanimously, *against* the plan, and it was thereupon dropped. The men having voted "no" clearly showed that they had no fear of their employer and that he had not intimidated them by his speech.

The Board picked out testimony which it chose to "credit" even though in many instances the credited statement was later qualified by the same witness, and thereby found a "concerted course of action" to discourage organization and representation. It attempted to follow the suggestions of this Court in *NLRB* v. *Virginia Electric and Power Company*, 314 U. S. 469, on the remand of that case, by passing over the freedom of speech question raised by the company as much as possible. To the contrary, the Circuit Court of Appeals below devoted practically its entire attention to the question of freedom of speech, with the result that two phrases contained in the speech were found illegal under the Act. Petitioner contends that "it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening realities," *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, and that the subsequent discharges could not be connected with the prior speech under the theory that "what took place after the speech certainly cannot be made the basis of a finding of what one would understand by Barr's remarks," *NLRB* v. *Montgomery Ward & Company*, 157 F. (2d) 486, at 500. "Persuasion without

clearly defined coercion is not improper." *Thomas* v. *Collins*, 323 U. S. 516.

As to the questions regarding the Board–found unlawful discharges, the court below merely found (without any comment) that "the findings of the board as to discriminatory discharge are sustained by the record." Petition for rehearing was addressed particularly to this point because Petitioners seriously contend that there is no substantial evidence to support the findings and we attempted to challenge the court to point out wherein such a conclusion could be supported. The petition for rehearing was denied without opinion.

Mr Eiler was not an active member of the union and so admitted.

> "Q. Did you become active in any way in the union?
> "A. No, not just personally." (Eiler, R. 149.)

The other witnesses concurred, and some of them, including Mr. Beck, stated they didn't even know he was a member of the Union. The significance of this is that the Board found, contrary to the evidence, that he was an active union man and made that a basis of its order to rehire. Mr. Eiler was discharged because he had the worst absentee record in the shop (R. 256), which he admitted, but attempted to excuse the absences because of his eyes.

> "Q. And, as I understand it, your excuse for your frequent absences from work was your eyes; is that it?
> "A. That was some of the time, yes." (R. 156.)

The eyesight excuse was "credited" by the Board, notwithstanding he admitted he purchased goggles two or three months before his discharge to protect his eyes from the welding light. Even crediting eyesight as a cause of absenteeism, war production could and should not have been held up because of the infirmity of one man. He was

the only side assembler on the buck assembly. Clearly the Army could not excuse delays in delivery of critical materials because an employee was physically unable to do his share of the production work. Any employee may, of course, be lawfully discharged for disobedience of the employer's directions in breach of his employment contract.

> "The act does not prohibit an effective discharge for repudiation by the employe of his (employment) contract any more than it prohibits such discharge for a tort committed against the employer." (Word in parentheses supplied.) *NLRB* v. *Sands Mfg. Co.*, 336 U. S. 332.

> "It is implied on the contract of hiring that employees would do the work assigned to them." *NLRB* v. *Montgomery Ward & Company*, supra.

The work assigned to Eiler could not be done when the man was not on the job, no matter what the cause.

Referring now to Mr. Hughes, the other former employee whom the Board ordered reinstated with back pay. During June he conducted organizational activity on company time (R. 264), and was reprimanded on July 3d, when he admitted that he knew he should not act accordingly because Mr. Tull, the organizer, had so advised him (R. 246), and about that time he was advised regarding his slowing down production (R. 101). He was not only reprimanded, but his vacation pay was withheld, which Mr. Hughes admitted.

> "Q. And the reason for holding it up at that time was because you were holding up the line; wasn't it?
> "A. That is what they said" (R. 101).

When he was discharged a month and a half later, Mr. Hughes admitted:

> "A. The only thing, he said that I was holding up the line." (R. 97.)

Thus both Mr. Eiler and Mr. Hughes were discharged for good and sufficient reason, and the Board, in order to find that the discharges were illegal under the Act, had to make such finding on insubstantial evidence, unsupported by the claimants' own testimony.

Herein we have not attempted to cite all of the very large number of cases cited in our brief in support of our petition for certiorari and which, we submit, show the legality of the words and acts of Mr. Beck. We respectfully refer this court to the Brief not only for the court decisions supporting our contentions but for the page citations to the record as to each of the facts.

QUESTIONS PRESENTED

I. Whether petitioners lawfully exercised their rights of freedom of speech guaranteed under the First Amendment of the Constitution of the United States.

II. Is the Constitutional right of freedom of speech limited by the National Labor Relations Act so that an employer while talking to his employees is bound at his peril to choose words which could not later be construed as threats of discrimination or discharge?

III. Does not the Constitutional right of freedom of speech permit an employer, notwithstanding the National Labor Relations Act, to express to his employees his personal views against a union even to the extent of saying it was a "racket," that if they joined they were "sticking their necks out" and urging them all to go to a union meeting but to return with a "changed mind," when in the same speech he undisputedly coupled the antagonistic remarks with the statement that it was his own personal opinion, and he advised them that the choice was up to them and that if they wanted a union it was all right with him?

IV. Is the burden of proving violations of the Act on the National Labor Relations Board?

(a) Is the definition of Burden of Proof different under the National Labor Relations Act than in ordinary civil cases?

(b) Can the Board, in order to sustain such Burden of Proof make findings based upon inferences from insubstantial evidence.

V. With a slowdown in War Production, which was found by the Board to exist, was the discharge of two employees who were principally responsible for the slowdown a violation of the Act?

(a) Was the discharge of one employee who was not active in the Union and had the worst absentee record in the plant a violation of the Act?

(b) Was the discharge of one employee who deliberately slowed down production a violation of the Act?

(c) Does an employer have the right to discharge for cause, under the National Labor Relations Act?

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that personal opinions expressed by an employer to his employees were threats of discrimination or discharge.

2. In holding that two remarks in the speech of one of petitioners to his employees violated the Act and were not protected under the right of freedom of speech guaranteed by the Constitution.

3. In holding that the Act limits the right of freedom of speech guaranteed by the Constitution so that an employer speaks to his employees at the peril of having the Board and the Courts find that chance remarks show an intention of discrimination or discharge.

4. In failing to find that the burden of proof was on the Board to prove a violation of the Act.

5. In failing to find that the Board could not credit statements of witnesses later qualified, and in failing to find that such discredited statements have no probative value.

6. In holding that the Board's findings of discriminatory discharges were sustained by the record as to the discharge of the two employees involved.

REASONS FOR GRANTING THE WRIT

The right of freedom of speech guaranteed under the First Amendment to the Constitution of the United States has been so limited by the decisions of the National Labor Relations Board that it is but an abstraction. The power to limit the right of freedom of speech, delegated to the National Labor Relations Board in the case of ***NLRB*** v. *Virginia Electric and Power Company,* 314 U. S. 469, has been so construed by the Board and the court below as to make such guaranteed freedom wholly illusory. Under this decision an employer speaks to his employees at the peril of making chance remarks which might later be construed by the Board and the Courts as threats of discrimination or discharge, even though such remarks were expressed as the personal opinion of the speaker and even though no actual threat of discrimination or discharge was made. Thus the employer is "wholly at the mercy of the varied understandings of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such distinction offers no security for free discussion." *Thomas* v. *Collins,* 323 U. S. 516.

The Circuit Court of Appeals below picked out two isolated phrases in a half hour's speech by petitioner to his employees, and held that the reasonable and inevitable inference from these remarks was that a threat of discharge or discrimination was intended. One of these remarks was in full: "Personally, he thought we was sticking our necks out if we joined" (R. 105). The court below

isolated the phrase "sticking their necks out" and construed that as a threat intended to discriminate or discharge. The other phrase was "go to the meeting and return with a 'changed mind.'" Certainly these words are subject to varied means of various subtleties.

> "If subtleties may be invoked as the basis for an inference that non-coercive remarks may have had an altered import in the minds of the listeners, any employer would be subjected not only to the 'varied understanding of his hearers,' but also subjected to the chance of what the Board might infer. We think such a doctrine would take away all 'security for free discussion.'" *NLRB* v. *Montgomery Ward & Co.*, 57 F. (2d) 486, at 500. (The inner quotes refer to *Thomas* v. *Collins*, supra.)

The varied meanings are discussed in our brief at pp. 40, 41.

The right of freedom of speech as guaranteed by the Constitution should not permit the Board nor the Courts to limit employers any more than employees, and if employers are merely granted the right to express their opinions as to unions, but are subject to the limitation that any expression of these opinions might be construed as discriminatory or coercive, then there is no real freedom of speech. This court should redefine the rights of freedom of speech under the Constitution where employer-employee relations are involved under the National Labor Relations Act.

This question is far-reaching, has caused dissension among the Board members and disagreement among the various Circuit Courts of Appeals. In this case we contend there is a conflict between the instant case and that of *NLRB* v. *Montgomery Ward & Company*, supra, in the interpretation of the right of freedom of speech. These two cases were decided within a week of each other upon

general facts quite similar in nature. While the detailed facts are of course dissimilar, the broad principles of law involving the discharges and freedom of speech are identical and the decisions are in direct conflict each to the other.

The power of the Board to find discriminatory acts against an employer based upon insubstantial evidence should be more clearly defined, as should the burden of proof on the Board. This Court held in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287:

> "It is of prime importance that no constitutional right, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality."

Petitioners contend that this is a true and correct interpretation of the Constitution, and should be applied in the field of labor relations under the National Labor Relations Act.

The Board should be limited in its findings of fact to facts which are substantially proved, the Board likewise should not be permitted to make findings of fact based upon inferences from insubstantial evidence, and the burden of proof as ordinarily understood by the Bench and Bar in ordinary cases should not be differently defined under the National Labor Relations Act. This is a matter of substance in that the Board's findings should be limited to sound rules of evidence and thereafter would be "conclusive" as provided in the Act.

Either one or both of these broad principles should be considered by this court in the light of existing circumstances, and this case, in conflict with the Montgomery Ward & Company case, supra, raises these questions for determination.

Your petitioners present herewith as a part of this petition the record, and present their brief for consideration with this petition, discussing at greater length the questions involved.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued by this Honorable Court, and that the judgment of the Circuit Court of Appeals, Sixth Circuit, be reversed.

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Of Counsel.

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * *

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not

be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * * *

(c) . . . If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. . . . The jurisdiction of the Court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the

appropriate Circuit Court of Appeals, if application was made to the District Court as hereinabove provided and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28. (Jud. Code, §§ 239, 240.)

IN THE

Supreme Court of the United States

October Term, 1946

No. ————

HAL PETERSON, CHARLES PETERSON, TAYLOR CUMMINS, J. C. CUMMINS, KATHRYN M. BECK, and C. D. BECK, d.b.a. C. D. BECK & COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION

This brief in support of the Petition for a writ of certiorari seeks to reverse the judgment of the United States Circuit Court of Appeals, Sixth Circuit, affirming an order of the National Labor Relations Board, against petitioners. The court below found that two phrases of a speech by petitioner to his employees showed an intention of discrimination or discharge, and were not protected under the First Amendment to the Constitution, and found without comment that the Board's findings as to discriminatory discharges were sustained by the record. The opinion below is *NLRB* v. *Hal Peterson et al.*, 157 F. (2d) 514.

STATEMENT OF THE CASE

In the interest of brevity, the Court is respectfully referred to the Petition for a Writ of Certiorari herein, in which is recited a statement of the facts, as well as a

statement of the history of the case, however details of facts and page references are elaborated throughout the argument.

The statute involved is the National Labor Relations Act, 29 U. S. C., Sec. 151 et seq., the pertinent provisions of which are set forth in Appendix A to the Petition for Writ of Certiorari, page 17.

SUMMARY OF ARGUMENT

The managing partner of petitioner, Mr. C. D. Beck, made a speech to his employees for approximately half an hour during the course of which he discussed the slowdown in production, the critical need of the company's product for the War Effort, a telegram from Col. Lynn of Cleveland Ordnance District, urging return to normal production. He stated his opinion of the union, that it was a "racket," that he personally thought the employees were "sticking their necks out" if they joined the union, that he wanted all of the men to go to a union meeting and decide what they wanted to do. Some witnesses claimed that he asked them to go to the meeting and return with a "changed mind." He stated that the company would recognize the union, although personally he was against it. All derogatory remarks concerning the union were his personal opinions, as was clearly stated by every witness.

An employer does not violate the Act by expressing hostility to a union. *NLRB* v. *J. L. Brandeis & Sons*, (8th Cir.), 145 F. (2d) 556; *NLRB* v. *Montgomery Ward & Co.* (8th Cir.), 157 F. (2d) 486. It is not the intention of Congress to forbid an employer from expressing opinions as to labor unions, *Budd Manufacturing Co.* v. *NLRB* (3rd Cir.), 142 F. (2d) 922. The argument of constitutional privilege reaches farther than any mere question of statutory interpretation. If the act alone were to be considered, the courts, in doubtful cases, might favor a broad interpretation in

order to favor accomplishment of the legislative purpose but as against the claim of constitutional privilege, the rule must be to guard against all but clearly justified encroachments. *Thomas* v. *Collins,* 323 U. S. 516.

It is of prime importance that no Constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 324 U. S. 327.

The decision of the court below is in conflict with the decision of the Eighth Circuit in *NLRB* v. *Montgomery Ward & Co.,* 157 F. (2d) 486, as to the right of freedom of speech guaranteed employers under the First Amendment of the Constitution; also as to the right of an employer to discharge employees for cause.

Persuasion without clearly defined coercion is not improper. *Thomas* v. *Collins,* 323 U. S. 516.

Compulsory attendance of employees to hear the speech is not illegal. *NLRB* v. *Montgomery Ward & Co.* (8th Cir.), 157 F. (2d) 486. The Board has not raised this point to date and did not find it a discriminating practice.

The decision of this court in *Thomas* v. *Collins,* 323 U. S. 516, raises grave doubts as to whether the "imponderable subtleties" suggested in *NLRB* v. *Virginia Electric & Power Co.,* 314 U. S. 469, may be applied to whittle down the privilege of freedom of speech.

An employer should have the right to freedom of speech without the fear of subsequent misinterpretation by the National Labor Relations Board or the Courts, and he should not be at the mercy of the interpretation of his hearers or the board. *NLRB* v. *Montgomery Ward & Co.* (8th Cir.), 157 F. (2d) 486.

It is not improper to inquire as to the status of union organization. *Jacksonville Paper Co.* v. *NLRB* (5th Cir.), 137 F. (2d) 148. Nor is mere curiosity an unfair labor

practice. *Keystone Steel and Wire Co.* v. *NLRB* (2d Cir.), 155 F. (2d) 553.

The Board found discriminatory discharges were made some two weeks following the speech, therefore the discharges should not be used to color the speech nor the words contained therein. *NLRB* v. *Montgomery Ward & Co.* (8th Cir.), 157 F. (2d) 486.

Isolated or chance remarks in a speech, not in and of themselves threatening discharge, are not discriminatory action, *NLRB* v. *Brandeis & Sons,* 145 F. (2d) 556, and such remarks as found by the court below, to-wit: "sticking their necks out," and returning from a meeting with a "changed mind" do not constitute threats of discharge. These remarks are susceptible of different constructions and are therefore not illegal. *NLRB* v. *Shenandoah-Dives Mining Co.,* 145 F. (2d) 542.

Three men, Eiler, Hughes and Staley, were discharged for cause. Only Eiler and Hughes are complainants in this action. The Board did not file charges on behalf of Staley. Production was down. Fabricating and assembly work back of the buck assemblers department, where these three men were employed, was piling up. All scheduling was done by the Army, representatives of which advised petitioners to find the men causing the slow-up and fire them. It is the prerogative of management to discharge employees for cause. *NLRB* v. *Montgomery Ward & Co.* (8th Cir.), 157 F. (2d) 486; *NLRB* v. *Sands Mfg. Co.,* 306 U. S. 332; *NLRB* v. *Columbia Products Corp.* (2d. Cir.), 141 F. (2d) 687; *C. & G. Conn, Ltd.* v. *NLRB* (7th Cir.), 108 F. (2d) 390; *NLRB* v. *Condenser Corporation* (3d Cir.), 128 F. (2d) 67; *NLRB* v. *Mt. Clemens Pottery Co.* (6th Cir.), 147 F. (2d) 262.

It was not the intent of Congress to compel employers to retain persons in their employ regardless of their unlawful conduct. *NLRB* v. *Fansteel Corp.,* 306 U. S. 240.

The question of proper discipline is a matter for decision by management. *Wyman-Gordon Co.* v. *NLRB* (7th Cir.), 153 F. (2d) 480.

Fragmentary and unrelated suspicions are not sufficient in substance to transform a proper exercise of discharge into an improper one. *American Smelting and Refining Co.* v. *NLRB* (8th Cir.), 126 F. (2d) 680; *NLRB* v. *Sheboygan Chair Co.* (7th Cir.), 125 F. (2d) 436.

Mr. Eiler was discharged for cause, to-wit: absenteeism, he having had the worst absentee record in the plant, and the Board was forced to find, "it is evident that Eiler was frequently absent, a practice that had extended over several months" (R. 29), but it improperly excused the absences as being due to bad eyesight. War production could not be held up due to the physical infirmities of an employee in a pivotal position such as held by Mr. Eiler. He admitted that only part of his absences were due to eyesight (R. 156). He was admittedly not an active union man, but merely a member of the union, but that fact taken alone, if it were true that he was active in the union, is no evidence that the discharge was as a result of union activity. *NLRB* v. *Citizens-News Co.* (9th Cir.), 134 F. (2d) 970.

Hughes was discharged for slowing down production. He was warned on July 3, 1944, against solicitation of union membership on company time and against slowing down production. At that time he was reprimanded and disciplined by having his vacation pay withheld. The right to make such reprimand can scarcely be questioned. *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793; *NLRB* v. *May Dept. Stores Co.* (8th Cir.), 154 F. (2d) 533; *NLRB* v. *J. L. Brandeis & Sons* (8th Cir.), 145 F. (2d) 556; *NLRB* v. *Edinburg Citrus Association* (5th Cir.), 147 F. (2d) 353.

Mr. Hughes told his fellow employees, who knew that he was disgruntled because of the disciplinary action, that he was only going to do as much as he had to to get by.

He, in fact, did not do that much, which was the cause for discharge. While Mr. Hughes was given a raise shortly before he was discharged, it was given pursuant to War Labor Board order and he was raised to the minimum classification therein approved. The mere fact of the raise in compensation does not prove that he was a satisfactory employee. *NLRB* v. *Montgomery Ward & Co.* (8th Cir.), 157 F. (2d) 486. The Board based its findings of discriminatory discharges upon fragmentary and unrelated suspicions from acts not in and of themselves illegal. Such findings were improper. *American Smelting & Refining Co.* v. *NLRB* (8th Cir.), 126 F. (2d) 680; *NLRB* v. *Sheboygan Chair Co.* (7th Cir.), 125 F. (2d) 436.

The right of freedom of speech not having been properly extended to petitioners and the Board and court below having construed chance remarks as evidence of intent to discriminate or discharge; the court below having stated, "The findings of the Board as to discriminatory discharge are sustained by the record" (with no other comment as to this important element of the case), found evidence to support the board's findings of discriminatory discharge when such findings must have been based upon improper fragmentary and unrelated suspicions and not on fact, therefore the discharges having been made for good and sufficient as well as legal reasons, the court below should be reversed.

ARGUMENT

I. Mr. Beck Exercised His Constitutional Right to Express His Personal Opinion of the Union without Imposing Interference or Restraint on the Employees Generally.

The first point before this Court for its consideration is the question concerning the definition of the rights of an employer to freedom of speech under the First Amendment of the Constitution. We will herein show that the Board has so limited the right of freedom of speech

to the employer in this case that there is little, if any, right of freedom left. Furthermore, the Board and the court below have picked out isolated phrases from a lengthy speech, which, in and of themselves, should not be construed as threats of discrimination or discharge, and particularly when coupled with the statements that they were Petitioner's personal opinion. These remarks should not be made a basis for finding an unfair labor practice under the Act as the constitutional guarantee of freedom of speech is greater than the confining limitations placed upon this freedom by the court below.

Since the speech was made about two weeks *prior* to the discharge of three employees (only two of whom are complainants) and thus since the speech could not have been heard with the present fear of discharges, we will discuss the right of freedom of speech under the Constitution first. Then we will show in Point III herein that the slackening of production was a matter of great concern during June, July, and August, 1944, and that the petitioners had tried to comply with Army requirements to get production back to normal but had been unable to do so, thereafter, Petitioners had the legal right to discharge the offending employees. In Point IV, we will show that one of the employees (not a complainant, no charges were filed by the Board as to him) was discharged for good cause. We discuss this only because he was discharged at the same time as the other two employees for whom charges were filed, and the board co-mingled the discharge as evidence of discriminatory practices. Then, in Point V, we will show that one employee, Mr. Eiler, was discharged because he had the worst absentee record in the plant, and following that, in Point VI, we will show that the other employee, Mr. Hughes, was discharged for slowing down production. Both were discharged for good, valid, and legal reasons.

Mr. Beck frankly admitted (on the witness stand *only*, but not to his employees) that he did not like the CIO organizer, Mr. Tull, after they got together for their first meeting on August 3, 1944. Nor was he satisfied that Mr. Tull was sincere in the recent propaganda bulletins he had previously issued to the employees. During the same afternoon, and following that conference with Tull. Mr. Beck called all of his employees together and made a speech to them, certain phrases of which speech the Board bitterly denounced, and used as the principal basis for finding violations of the National Labor Relations Act. The court below confined its opinion to finding that two phrases were not protected by the Constitutional right of freedom of speech.

The Board concedes, as it must, that production problems were discussed during the half-hour speech and that the slackened production was a matter of great concern to the Army. On the other hand, petitioners concede that Mr. Beck made remarks against the union. But petitioners contend that these remarks were stated as the *personal opinion* of Mr. Beck, and that Mr. Beck clearly advised his employees that he was not attempting to influence their actions with reference to joining or not joining the union, and that such remarks were within his constitutional rights of free speech. Further, that there was no misunderstanding by any of the employees to the effect that he was stating his *personal opinion* and that they could exercise their free will in joining or not joining the union.

Since this point is of great importance in the case, we will quote from the record at some length.

Complainant, Mr. Hughes (R. 105):

> "A. Well, he said it was nothing but a political racket, and he said *himself* he was against it. And he said *personally* he thought we was sticking our necks out if we joined. Now that is the way I took it.

"Q. Now, didn't he also say that you could join the union, all of the employees could join the union, if you wanted to?[3]

"A. Well, I believe he did say that, all right."

Complainant, Mr. Eiler (R. 162):

"Q. Do you recall Mr. Beck saying anything about joining or not joining the union?

"A. He said something about the union, and, in a way, that he said that *personally* if we wanted to join the union, why, we could, but *personally* he didn't think it was the right thing to do. And another thing he said we was sticking our necks out. *He said if we wanted to join the union why that was up to us.*"

Another Board's witness (R. 188):

"And you also recall that at this meeting, this speech that Mr. Beck gave, that he told the men they could join or not join the union as they wanted, isn't that true?

"A. That is right."

Re-direct examination by Board's Attorney (R. 189):

"Q. You just told us that Mr. Beck offered a choice to the men? Just how did he put that?

"A. Well, as I recall right he suggested that we all go to the meeting, and then decide which,—*how we wanted to do.*"

Re-direct examination by Board continued (R. 190):

"Q. When you said Mr. Beck requested you to attend a meeting, do you mean that by that he requested you to meet with him at the clock?

"A. Oh, no, he made the statement that he would like to have all of us go to the union meeting and *decide what we wanted to do.*

"Q. And did you go to that union meeting?

"A. I did."

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[3] All emphasis in quotations from the Record and emphasis in all quotations from decisions supplied unless otherwise stated.

Another Board's witness (R. 198):

"A. Well, he said he wanted every member to go to that meeting that night, and *he wanted them to decide one way or the other.*"

"Q. Did Mr. Beck ever tell you he didn't want a union in the shop?

"A. No."

Another Board's witness, on direct examination (R. 130):

"Q. Well, what, if anything did he say to you people at that time?

"A. Well, in general, he talked about the incentive plan and he spoke of the union *in his own opinion,* however, that he thought it was a racket, see the CIO. He talked about the efforts he had made to get us a raise through the W.L.B. and further advised us all to go to the meeting and to listen to Mr. Tull, *and that if we saw fit in our own mind . . . to sign a card and have an election and vote the union in and it would be O. K. with him.*"

(R. 133):

"Q. And didn't Mr. Beck say that if the majority of the employees wanted a union, it was perfectly all right with him in that meeting?

"A. Yes, he said that.

"Q. Now, you said something about he stated that the CIO was a racket. Did he urge anybody else to believe that or did he simply state it as his own opinion?

"A. *He voiced that exclusively as his own opinion.*

"Q. Did that influence you in any way?

"A. It did not."

(R. 134):

"Q. Isn't it true that immediately following his opinion he stated most clearly that it was entirely up to the employees, if they wanted a union it was perfectly all right with him?

"A. Yes, sir, *he did say that.*"

(R. 381):

> "A. As I recollect he said that the Company *would recognize the Union,* although *personally* he was against it."

Extended quotations could be carried from each and all of the witnesses, both for the Board and petitioners, who repeatedly stated on both direct and cross-examination that Mr. Beck was merely stating his OPINION with reference to the union, *and that he wanted to have the employees act in accordance with their own desires.*

The element of time relationship of various acts must be considered in determining whether individually they are interferences, or, collectively, they constitute a pattern. Here the speech was made on August 3, 1944, and the discharges of Eiler and Hughes were made on August 14, 1944. It therefore cannot be claimed that the speech was listened to with knowledge of the discharges and that intimidation was implicit in the circumstances. Nothing had happened to make the speech more than a proper expression of Beck's opinion, nor to color his words with added or different-from-normal meaning.

II. Under the First Amendment to the Constitution of the United States, an Employer Is Privileged to Discuss the Facts of a Labor Dispute, to State His Opinions as to the Merits of any Aspect of the Dispute, and to Express Friendship or Hostility Toward a Union or Its Agents, without Incurring the Penalty of a Board Order to Cease and Desist, or the Future Restraint of a Court Decree Enforcing Such an Order.

That an employer does not violate the Act by expressing hostility to a union or its representatives was decided in *NLRB* v. *J. L. Brandeis & Sons* (8th Cir.), 145 F. (2d) 556, and that statement was followed in *NLRB* v. *Montgomery Ward & Company* (8th Cir.), 157 F. (2d) 486, and in this latter case the court went on to say, at page 498:

> ". . . may state his policy with reference to labor matters, and may express hostility to a union or its representatives. . . . The right of free speech guaranteed by the First Amendment is not limited to any class and is not denied an employer by the terms of the National Labor Relations Act, 29 U. S. C. A. § 151 et seq."

See also *Virginia Electric* v. *NLRB,* 314 U. S. at 477.

We contend that this case is in conflict with the Eighth Circuit decision in the *Montgomery Ward* case, among other reasons later discussed, in that the court below too narrowly limited the right of freedom of speech. The Eighth Circuit quotes from *Thornhill* v. *Alabama,* 310 U. S. 88, as follows:

> "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."

The Court in the *Montgomery Ward* case went on to say at page 499 (point 19):

> "The First Amendment does not prohibit the communication of ideas but rather guarantees that right. Such a prohibition or restraint upon the freedom of speech is to be imposed *only in the clearest cases.* As said by the Supreme Court in *Thomas* v. *Collins,* supra (323 U. S. 516, 65 S. Ct. 322):
>
> > 'For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.' "

Certainly, in this case the expression of personal opinions by Mr. Beck were not "clear and present danger" of discrimination or discharge, as held by the court below,

particularly when, for example, they were clearly coupled with statements such as the following:

> ". . . and further advised us all to go to the meeting and to listen to Mr. Tull, and that if we saw fit in our own mind to sign a card and have an election and vote the Union in, and it would be okay with him." (R. 130.)

It has been remarked that *NLRB* v. *Virginia Electric & Power Co.*, 314 U. S. 469, "marks a definite departure" from the earlier view "that an employer must be neutral in his attitude in all labor matters and must refrain from expressing his opinion"; *NLRB* v. *J. L. Brandeis & Sons* (8th Cir.), 145 F. (2d) 556, 563-564.

The *Virginia Electric* decision is capable of two interpretations: first, that it dealt primarily with the intent of Congress and the proper meaning of the Act; or, second, that the Supreme Court was defining a privilege under the First Amendment which an employer might raise to justify utterances which otherwise would constitute interference with the exercise of employee rights. To a large extent, the result is the same, whichever logical road is followed:

> "But it makes no difference which view we take: whether there was not enough evidence of coercion, or whether, though there was, the utterances were privileged: in either event, without more they did not support the finding." *NLRB* v. *American Tube Bending Co.* (2d. Cir.), 134 F. (2d) 993, 995.

The decision in the *Virginia Electric* case reads as if this Court regarded the Act when properly interpreted as not raising a constitutional issue. Noting that the employer had argued that the Board's finding was "repugnant to the First Amendment," this Court commented:

> "Neither the Act nor the Board's order here enjoins the employer from expressing his views on labor poli-

> cies or problems, nor is a penalty imposed upon it because of any views which it has made." 314 U. S. at p. 477.

The rest of the decision is a discussion leading to the conclusion that the employer's utterances were such as made it "difficult to sustain a finding of coercion with respect to them alone" (314 U. S. at p. 479).

The bulletin and speeches which were before this Court in the *Virginia Electric* case had been found by the Board (314 U. S. at p. 478): (a) to show "a marked bias against national unions"; (b) to amount to "an appeal to the employee to bargain with the respondent directly without the intervention of an 'outside' union"; (c) to imply "that strikes and unrest are caused by the organizational campaigns" of national unions; and (d) to emphasize the "negative 'right' of the employees to refrain from exercising their rights guaranteed under the Act."

These findings were a fair statement of the purport of the bulletin and speeches. Nevertheless, they were held insufficient to sustain "a finding of coercion," especially since

> "The bulletin and the speeches set forth the right of the employees to do as they please without fear of retaliation by the company." 314 U. S. at p. 479.

The clear implication is that, to be coercive and unlawful, utterances must be such as to inspire employees with a "fear of retaliation" if they freely exercised their rights in a manner displeasing to the employer.

This is a logical reading of the language of the Act. "Interference," "restraint," and "coercion" must be regarded as mutually defining words under the maxim *noscitur a sociis*. This Court earlier applied this maxim to a comparable phrase ("without interference, influence, or coercion") of the Railway Labor Act:

> "The meaning of the word 'influence' in this clause may be gathered from the context. *Noscitur a sociis.* The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.'" *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548, 568.

The substitution in the Act of the word "restraint" for the word "influence" used in the earlier statute has, if anything, narrowed rather than broadened the field of conduct which is prohibited.

Many acts of an employer may in a loose sense "interfere with" or influence a choice of conduct with which the employees may be confronted. The refusal to concede an important union demand, even after a strike, may cause employees to desert the union or to refuse to vote a later strike; but no reasonable man would suppose that Congress intended to prohibit employer "interference" with union activities by refusing to make concessions. By the same logic, this Court points out in the *Virginia Electric* case: "The employer . . . is as free now as ever to take any side he may choose on the controversial issue." 314 U. S. at p. 477.

An employer's words and acts combined may constitute a "pressure" which is forbidden:

> "And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways." 314 U. S. at p. 477.

However, the vocal "pressure" which is forbidden is an express threat or implied suggestion of economic penalties which will create a "fear of retaliation" on the part of

employees "who know the consequence of incurring that employer's strong displeasure" (314 U. S. at p. 477).

This Court found that the bulletin and the speech then before it were not, standing alone, sufficient basis for a Board order since they did not in themselves attain "the stature of coercion" (314 U. S. at p. 479). The *Virginia Electric* case thus is authority for the proposition that expression of hostility to a union and the advancement of arguments why employees should not select a union for their bargaining representative are not coercive interference prohibited by the Act.

> ". . . It was not the intention of Congress to forbid an employer from expressing opinions as to labor unions or as to anything else, so long as his expressions *do not constitute or contribute to acts or threats of discrimination, coercion, or intimidation* in denial of his employees' free and untrammeled exercise of their rights as guaranteed by the Act." *Budd Mfg. Co.* v. *NLRB* (3rd Cir.), 142 F. (2d) 922, 926.
>
> "All that the statute prohibits is domination, interference, and support. The employer has the right to have and to express a preference for one union over another so long as that expression . . . is not *the use of economic power to coerce, compel, or buy the support of the employees* for or against a particular labor organization." *Continental Box Co.* v. *NLRB* (5th Cir.), 113 F. (2d) 93, 97.
>
> "No threat or intimidation of a threat to any union member or to any workman contemplating union membership is presented. . . . An employer . . . *may express his hostility to a union and his views on labor problems or policy, providing he does not threaten or coerce his employees.*" *NLRB* v. *Brown-Brockmeyer Co.* (6th Cir.), 143 F. (2d) 537, 541.

The 8th Circuit Court, in the *Brandeis* case, recognized the necessity of a "threat of reprisal":

> "In no utterance, whether it was printed or oral, does there appear any threat of reprisal for any action

> which the employees might take in the matter of union organization or activities." *NLRB* v. *J. L. Brandeis & Sons* (8th Cir.), 145 F. (2d) 556, 564.

The right of free speech clearly extends to "the dissemination of information concerning the facts of a labor dispute," and protects "freedom of discussion" upon that subject: *Thornhill* v. *Alabama,* 310 U. S. 88, 102. The right of free speech "is enjoyed by employers as well as by employees": *Midland Steel Products Co.* v. *NLRB* (6th Cir.), 113 F. (2d) 800, 804. The constitutional guarantee protects "the right to hold views upon any and all controversial questions, to express such views, and to disseminate them to persons who may be interested": *NLRB* v. *Ford Motor Co.* (6th Cir.), 114 F. (2d) 905, 913. As a result an employer

> ". . . may disseminate facts within the area of dispute, may even express his opinion on the merits of the controversy even though it involves labor organizations, may indicate a preference for individual dealings with employees, may state his policy with reference to labor matters, and may express hostility to a union or its representatives." *NLRB* v. *Brandeis & Sons* (8th Cir.), 145 F. (2d) 556, 564.

The argument of constitutional privilege reaches farther than any mere question of statutory interpretation. If the Act alone were to be considered, the courts, in doubtful cases, might favor a broad interpretation to insure accomplishment of the legislative purpose. But as against the claim of constitutional privilege, the rule must be to guard against all but clearly justified encroachments:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual prescription supporting legislation is balanced by the preferred place given in

> our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions." *Thomas* v. *Collins*, 323 U. S. 516, 529, 530.

In order to avoid "dubious intrusions" by Board orders, the fact that an employer has gone beyond mere arguments or persuasion must be clear: "It is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 293.

Persuasion is not improper simply because it is persuasion to action. Hence:

> "... employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. . . . When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. But short of that limit the employer's freedom cannot be impaired." *Thomas* v. *Collins*, 323 U. S. 516, 537-538.

Unless Mr. Beck's speech to his employees clearly contained coercive threats, it was the exercise of a liberty guaranteed by the Constitution, and we submit that his *personal opinions* are not clearly coercive threats.

A. It Is Not Illegal to Make Speech at the Plant

The Board's findings merely comment on the fact that the meeting was called at the time clock fifteen minutes before quitting time (R. 24), but do not find that such was a discriminatory practice. A comparable situation was found not discriminatory in the *NLRB* v. *Montgomery Ward & Co.* case, points 16 and 17, at page 498.

The right of free speech is not lost because the occasion is one where the expression of opinion may influence action.

> "The occasion on which the employer elects to utter his thoughts is not to be considered as an element of coercion. He is as free to speak at one time as another. *NLRB* v. *American Tube Bending Co.*, 134 F. (2d) 993; *Continental Box Co.* v. *NLRB*, 113 F. (2d) 93; *NLRB* v. *West Kentucky Coal Co.*, 152 F. (2d) 198." *NLRB* v. *Montgomery Ward & Co.* (8th Cir.), 157 F. (2d) 496 at 499.

Consequently the sending of a letter and the reading of a prepared statement on the eve of an election have been expressly approved by the courts. *Peter J. Schweitzer, Inc.* v. *NLRB* (App. D. C.), 144 F. (2d) 520; *NLRB* v. *American Tube Bending Co.* (2d Cir.), 134 F. (2d) 993 (cert. den., 320 U. S. 768); *Continental Box Co.* v. *NLRB* (5th Cir.), 113 F. (2d) 93, 96; *NLRB* v. *West Kentucky Coal Co.* (6th Cir., Dec. 6, 1945), 152 F. (2d) 198, 202; and *NLRB* v. *Brandeis & Sons* (8th Cir.), 145 F. (2d) 556, 563. The sole test is whether the statement "appealed to the employee's reason, not to his fear, and hence was protected by the First Amendment"; *NLRB* v. *West Kentucky Coal Co.* (6th Cir., Dec. 6, 1945), 152 F. (2d) 198, 202.

Compulsory attendance at a meeting is not in itself economic compulsion to change views and to refrain from any collective action desired by the employees. In the *NLRB* v. *Brandeis* case, 145 F. (2d) 56, at 562, the court did not regard the fact that "employees were kept a few minutes after store closing hours to listen to a speech" as making the speech illegal.

> "The First Amendment is concerned with the freedom of thought and speech of the speaker or writer, not with the conditions under which the auditor or reader receives the message. One need not as a condition precedent to his right of free speech under the First Amendment, secure permission of his auditor.

> The First Amendment does not purport to protect the right of privacy nor does it require that the audience shall have volunteered to listen (citing *Martin* v. *City of Struthers,* 319 U. S. 141). . . . Speech is very frequently invoked as a means to persuade those who do not agree with the speaker and may not even wish to hear him." *NLRB* v. *Montgomery Ward & Co.* (8th Cir.), 157 F. (2d) 496 at 499.

B. The Criticized Words in the Speech Are Not in and of Themselves Illegal

The courts have upheld the right of employers in language more vivid than that used by Beck to express hostility to the CIO here. *NLRB* v. *Brown-Brockmeyer Co.,* 143 F. (2d) 537, 543; *Jacksonville Paper Co.* v. *NLRB,* 137 F. (2d) 148; *NLRB* v. *Citizens-News Company,* 134 F. (2d) 962; *NLRB* v. *Brandeis & Sons,* 145 F. (2d) 556.

How then can Beck's Statement of his *personal opinion* that the "CIO is a racket," his *personal opinion* that the employees were "sticking their necks out" if they joined, and that they should go to the meeting and return with a "changed mind" and that he was "against unions" (R. 25) be held to be illegal, particularly when each and every witness, including the complainants as well as all Board witnesses, testified that he said they could decide one way or another and make up their own minds and that the remarks had no effect on their decision whatsoever?

Even standing alone, these remarks are not threats of economic reprisal. At the very worst they could only be construed as intended to influence the employees against their will by the arguments presented.

Not too dissimilar words were used in *Jacksonville Paper Co.* v. *NLRB* (5th Cir.), 137 F. (2d) 148, 152.

> "(19) Granting that Mixson said the employees would *gain nothing from joining the Union,* and that it was organized by *racketeers,* and that he made other simi-

lar statements, such, standing alone, without threatened, coercive, or punitive action, is within the right of free speech and not within the condemnation of the statute."

"If they were influenced against their will by the arguments presented, this was a legitimate consequence of free speech and presumably one of its purposes. Free speech is not to be limited to ineffective speech. As said by the Supreme Court in *Thornhill* v. *Alabama*, 310 U. S. 88, 'Every expression of opinion on matters that are important has the potentiality of inducing action in the interest of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.'" *NLRB* v. *Montgomery Ward & Co.*, supra, at 499.

The court below criticized two utterances. First, when the employer "states to his men that if they join the Union they are 'sticking their necks out.'" Such an expression could have an "altered import" or "varied understanding," for instance, he could have meant that the payment of large sums to the union in dues would be costly to the employees without an equivalent benefit; or that the union might insist upon and get a closed shop, thus requiring membership as a condition of employment, and thereafter subjecting the employees to the will of union business representatives against the employee's individual will. Further, that there would be not only the payment of dues but possible assessments for the benefit of others than the employees of the plant, and possibly other detriments flowing from union membership. Certainly the expression could have meant the foregoing, as well as the threat of discriminatory acts by the employer as held by the court below. Realistically the expression is quite common and merely means "doing the wrong thing." Furthermore, this ex-

pression is recognized as a slang expression by *Berrey and Van den Bark,* in the *American Thesaurus of Slang,* at paragraph 170.6, the definition for "general usage"

> "To stick out one's neck, to stick one's neck out, means to make an error, mistake, or blunder."

At paragraph 198.5, under "communication usage," the definition is:

> "To stick one's neck out, stick out one's chin or neck, means to expose one's self to criticism."

Certainly none of the foregoing imply a threat of discharge nor even of discrimination.

Turning to the second utterance criticized by the court below, that they go to the meeting and return with a "changed mind." Such an expression, if it stood alone, would be, at the very worst, an effort of persuasion on his part. Certainly Mr. Beck could not have known the individual "minds" of all of the employees. Certainly many of the employees might have then been, and probably were, against the union. To urge them to change their minds might be to change them in favor of the union.

Then, turning to the Board-criticized expressions, we find they are that the "C. I. O. was a 'racket'" (R. 25), a "damned political racket,"[4] that he was "against unions" (R. 25), all of these are in addition to the court-criticized expressions. Analyzing these and even assuming that he made all of the statements, certainly they are only arguments and expressions of opinions as was admitted by all of the employees. They do not threaten coercion or economic reprisal and while expressing hostility, such expressions are not illegal as we have herein shown from many decisions.

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[4] This remark was only testified to by Tull and was therefore, if made, made in a private conversation (see R. 23, Board's finding; then turn to R. 31 to see how the Board improperly uses that expression).

C. The Criticized Words Could Only Be Illegal Considered in the Light of "Imponderable Subtleties" Which Now Seems to Be Modified if not Overruled

This Court suggested in the *Virginia Electric* case, that utterances otherwise innocent might be "raised to the stature of coercion by reliance on the surrounding circumstances" (314 U. S. at p. 479).

The suggestion of this Court was explained by its later sentence: "Perhaps the purport of these utterances may be altered by imponderable subtleties at work which it is not our function to appraise" (314 U. S. at p. 479). In other words, utterances not constituting threats of reprisals in themselves might, in the light of "imponderable subtleties" evidenced by the "surrounding circumstances," have an "altered import" making them the equivalent of express threats.

The later decision of this Court in *Thomas* v. *Collins,* 323 U. S. 516, raises grave doubts whether such a subjective test may be applied to whittle down the privilege of free speech. The argument was advanced, in the *Thomas* case, that the right of free speech could be curbed by prohibiting unlicensed union leaders from "inviting" union membership, while still permitting them to discuss unionism. This Court's answer was unhesitating:

> ". . . whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clearcut distinction . . . puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion." *Thomas* v. *Collins,* 323 U. S. 516, 535.

By the same token, to permit "imponderable subtleties" to be the basis of an inference that his noncoercive words may have had an "altered import" in the minds of the listeners would put any employer at the mercy, not alone of the "varied understanding of his hearers," but also at the mercy of a Board inference as to that "varied understanding." Such a rule would take away all "security for free discussion." *NLRB* v. *Montgomery Ward & Co.* (8th Cir.), 157 F. (2d) 496 at 500.

At this point we call this Court's attention to the decision of the National Labor Relations Board in the case *In re Fisher Governor Co.*, 19 LRRM 1117, 71 NLRB No. 206, Case No. 18C-1224, December 31, 1946, wherein the three members of the Board divided three different ways on two questions: (1) discriminatory discharges and (2) freedom of speech. We cite this case to show the utter confusion which the *Virginia Electric* case has caused in the minds of the Board itself. In all sincerity the various members of the Board are trying to follow the law as interpreted by this Court, but obviously are finding great difficulty.

Board Member Houston, with whom Board Member Reynolds agrees, finds that the discharges ten days *prior* to the speech were illegal. Chairman Herzog disagrees. But Board Member Houston finds that the speech was illegal because it followed the discriminatory discharges, which constituted to him a pattern of discrimination under the *Virginia Electric* case. Board Member Reynolds feels that the spech, though protected under the First Amendment, throws a light upon the prior discharges, thus making the discharges illegal. Chairman Herzog, writing the third opinion, disagrees that the discharges were illegal and finds that

> ". . . the speech, standing by itself, certainly was privileged under the First Amendment. I, therefore,

join in the result reached by Mr. Reynolds, but for different reasons."

This difficulty of the Board emphasizes the impossibility of the employer determining what he can safely do and say under the principle of the *Virginia Electric* case and the advisability of a restatement of the principles by this Court.

Considering the fact that the discharges of Hughes, Eiler, and Staley did not take place until about two weeks *after* the speech, the Board could not find, as it has in many cases previous to the *Fisher Governor Co.* case, that the speech threatened discharges for union activity such as had previously been made. It is of the utmost importance in the instant case that there is evidence of *not one single* discharge prior to the speech.

> "What took place after the speech certainly cannot be made the basis of a finding of what one would understand by Barr's remarks, and, as already observed, the discharges of those employees were justified." *NLRB* v. *Montgomery Ward & Co.* (8th Cir.), 157 F. (2d) 496 at 500.

D. The Other Acts of Mr. Beck before the Speech Were Not Unlawful Even under the Act

Turning, for the moment, to the miscellaneous acts of Mr. Beck, before the speech, which were criticized by the Board but not the court below, the fact that Mr. Beck called various employees into his office in an attempt to locate Mr. Tull, the union organizer, and also to find out the progress of organization is not illegal.

> "He (an employer) is not precluded by the Act from inquiring or being informed as to the progress of the efforts at unionization. He has a right to inquire if the union was organized or if it has 'washed up.'" *Jacksonville Paper Co.* v. *NLRB* (5th Cir.), 137 F. (2d) 148, 152.

> "The . . . general superintendent of Keystone stated that he expected to procure the names of certain employees who had attended a meeting of the CIO union. The evidence does not disclose that he ever procured these names or if he did that he ever did anything about it. This Court has decided that *mere curiosity is not an unfair labor practice.*" (Emphasis added.) *Keystone Steel & Wire Co.* v. *NLRB* (2d Cir.), 155 F. (2d) 553.

The Board bases several of its findings of illegality on inferences drawn from other supposedly illegal acts, while those latter acts are found to be illegal in part because of the inferences drawn from the illegality of the former. This is a form of circular reasoning which the Courts have previously had occasion to condemn in Board cases:

> "Obviously such discharges cannot be relied upon to show petitioner's opposition to the union and at the same time petitioner's opposition to the union relied upon to show that the discharges were discriminatory." *Wyman-Gordon Co.* v. *NLRB* (7th Cir.), 153 F. (2d) 480, 485.

Mention should also be made of the Board's unfair and illogical reference to Beck's remarks in private conversation with Tull, the Union's organizer. An unlawful interference is behavior calculated to influence the conduct of the *body of employees* in favor of the anti-union opinion of the employer. Remarks made during a private conversation with the Union representative, who was not an employee, do not meet that test. That Beck made any particular statement to Tull would reach Beck's employees only if Tull told them and he would tell them not for the purpose of influencing them in Beck's favor but to influence them against Beck and in his own favor, and it is unreasonable and illogical to penalize Beck as did the Board.

Mr. Beck never refused at any time to discuss the matter of the Union with Organizer Tull, and Tull admits that

he never made a request or demand for a meeting on Mr. Beck that was refused (R. 75). The delayed meeting between Tull and Beck was due to Beck's inability to find Tull, although he made unusual efforts to locate Tull (R. 20). While Mr. Beck admitted *on the witness stand* that he did not like Mr. Tull, nobody testified that he expressed such an opinion at any time to any of the employees, notwithstanding the Board's attempt to so infer (R. 24) by not quoting the testimony following the opinion of Mr. Beck concerning Mr. Tull, which is as follows (R. 319):

> "Q. But was that your personal opinion and did you try to force your employees to do anything about that?
>
> "A. No, sir, I never brought that out to the employees, that was strictly a personal opinion that I felt of Mr. Tull myself."

There was one meeting in the office of Mr. Beck, to which he had called certain key employees from each department of the plant. The purpose of the meeting was to advise them concerning the slackening production and to determine whether or not the men wanted a union, and it is admitted by every witness who attended that particular meeting that Mr. Beck clearly told the men that if they wanted a union to hurry up and get it so that they could get back into production. A brief reference to the testimony of one of the *Board's witnesses* will show that again Mr. Beck clearly gave the employees their right to choose (R. 131):

> "Q. And at that time if I understand your testimony correctly, he told you that if there were enough men in the union, or in the shop that wanted a union, why, to go ahead and have it, isn't that true?
>
> "A. That is true.
>
> "Q. Did Mr. Beck in any way at that time try to keep you from joining the union?
>
> "A. No, sir.

"Q. Did he tell you to do anything about keeping other people from joining a union?

"A. No, he did not.

"Q. As a matter of fact he did to the contrary. If the men in the shop wanted a union, he said it was perfectly all right to go ahead and have it, didn't he?

"A. Yes, sir."

At that meeting Mr. Beck had not formed an opinion of the union, in fact, was in favor of having it if the men wanted it, so that such a possible cause of slackened production could be corrected. This was admitted by Board witnesses and is undisputed in the record.

At no time in any of his talks with any of his employees did Mr. Beck threaten discharge nor did he threaten coercive action and upon careful analysis the Board does not actually so find although an ordinary reading would so indicate. At one time only were any words used that could possibly be construed as a "reasonable and inevitable inference is that a threat of discharge and discrimination is intended." (Decision below at 515.) That time was the speech to all employees and certainly the criticized words of "sticking their necks out" and "changed mind" are not so clearly intended threats that they are, in connection with the whole speech, illegal. Civil liberties must not be "defeated by insubstantial findings of fact screening reality," *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 293. The rule of law is clear that "chance remarks" do not constitute interference. *NLRB* v. *Brandeis & Sons* (8th Circuit), 145 F. (2d) 556.

The 10th Circuit Court said "but the inference of liability will not be drawn in such a case from a small number of isolated and unrelated incidents by minor officials especially when they themselves are susceptible of different constructions." *NLRB* v. *Shenandoah-Dives Mining Co.*, 145 F. (2d) 542, 547.

We therefore submit that the speech made by Mr. Beck was protected under the First Amendment and that it is improper and erroneous to find, as the Board did, "the threat of discharge implied in his speech was exemplified in his act of ordering the summary dismissal of these men" (R. 31). The justification for these discharges will now be discussed and we will show that due to the slowdown in production the discharges were made for good cause, first, the absenteeism of Mr. Eiler, and, second, the slowing down in production of Mr. Hughes.

III. There Was Definitely a Slowdown in Production During June, July, and August, 1944, and Employees Eiler, Hughes, and Staley Were the Cause Thereof.

That there was a slowdown in production during June, July, and August is not disputed by the Board. However, the Board so submerges this fact in its defense of Hughes and Eiler that it would appear that the slowdown either amounted to nothing or was a figment of the imagination of Mr. Beck, designed for the purpose of getting rid of employees Hughes, Eiler, and Staley.

Buses are large motor vehicles, produced by petitioners by line (not moving) production (R. 354). When one department of the production line fell down in the latter part of June, an attempt was made to correct the situation on July 3d.[5] That the Army was practically running the plant because of the critical nature of the product produced by the company is undisputed. Mr. Beck testified (R. 230):

> "I have no authority as to who I can sell and deliver to. I have no authority as to who I can buy from or receive material from. The only thing that I have is that I have to guarantee the payment of invoices. That is the only thing that is left to me. My production

[5] The corrective measures taken, to-wit, the reprimand of Mr. Hughes for "slowing down the line" will be discussed under the heading devoted to Hughes (p. 67).

> is handled and I am told what to do and when to do it, and I am told how to do it and what I can do it with." (Referring to the Army.)

Production had gone down to such an extent that there was considerable concern with Mr. Beck as to whether or not Automotive Tank Center of the Army would allocate further materials to the Beck plant. As shown by the testimony (R. 230),

> ". . . it started to taper off; that we were behind schedules, that the Army since March 15 had supervision over our supply of component parts such as axles, transmissions, engines, steering gears, and so forth, which were highly critical, and if I couldn't use the material they were allotting to me according to the production schedule that they had set up, they certainly wasn't going to give it to me and let it stand idle in the plant."

Mr. Beck, as managing director, was "checking production from day to day" (R. 233), and continuing, Mr. Beck stated:

> "Since the Union activities started, I didn't spend much time in the shop. But if you have been in that business as long as I have, you can walk out there and look your plant over and you get a pretty good idea of who is doing the work and who isn't."

In order that the Court may understand the production line, the undisputed evidence is that sections of the frame for the shell of the bus were fabricated in various parts of the plant (R. 235) and were moved to four "bucks" or stands on which they were assembled into a frame as shown in the picture (R. 405). The front, each side, the back, the top, and the bottom, were fabricated elsewhere in the plant in separate units, then moved to and assembled on these bucks (R. 235). In order to maintain production schedules, it was necessary that the four bucks be in continuous daily

use. During the period of slackened production, the fabrication of these parts was ahead of the assemblers on the bucks and only three of the four bucks were being used (R. 239).

The set-up men on these bucks were Hughes and Eiler, for the rear and side panels and top (R. 84). It was clearly apparent to Management and to the employees that panels and tops which were made immediately ahead of Hughes and Eiler were piling up and were having to be stored at various parts of the plant. At R. 239 the testimony shows:

> "During the summer it started to taper off, about the best we were doing was—all we could do was run around three bucks. In other words, a buck would set maybe two days. And at the same time my sides—my side men, building the side jigs, have never been changed in the last couple of years, and during the first part of the year they had to keep right going to keep up with the bucks. They started to pile sides up along in the building.
>
> "The top men had to take these tops out. And they are so large when you have to handle them, they are a pretty hard thing to handle. But, instead of bringing them off of the jig right on to one of the building bucks, we had to take them up and take them out the back way and set them up on edge in the mill room. Front ends were piling up.
>
> "And if you walk out in the plant and see assemblies piling up and yet jigs idle, you wonder what the heck —what is wrong. Because I hadn't changed by set up men.
>
> "A. I figured as close as I could figure, and I think I am correct, and as the results have worked out I was correct, that it had to be in the set-up, which consisted of Hughes, Eiler, and Stagg.
>
> "A. I think it was Hughes and Eiler and their helper (Stagg)—and it wasn't their helper's fault—that held up the bucks to get this stuff out of the road of the other men." (R. 298; parenthesis added.)

This condition caused concern with Army officials. One Ordnance Official, B. A. Dawson, came to the plant, and after investigating the situation and stating that the Army would try to handle the situation from a patriotic standpoint (R. 243), advised Mr. Beck as follows:

> "A. He told me that '*If you continue to have trouble*' he says, 'You are operating a business and *you know there is only one thing you can do and that is go out there and pick out the fellows that you know are actually holding her up and fire them,*" he said, 'I think that will solve your trouble.'" (Italics supplied.)

This investigation was followed by a telegram from Col. E. A. Lynn, District Chief, Cleveland Ordnance District, wherein he said: "Records show your schedules are falling behind" (R. 403). This telegram was directed to be posted as a message to the employees and pleaded with the employees to produce their share for the War Effort.

A. An Employer May Always Discharge an Employee for Cause

It has always been a prerogative of management that it has the right to discharge employees for cause. This prerogative is recognized in practically all union contracts today. The contract of employment implies that the employee will do his fair share of work.

> "It was implied in the contract of hiring that these employees would do the work assigned to them in a careful and workmanlike manner; that they would comply with all reasonable orders and conduct themselves so as not to work injury to the employer's business; that they would serve faithfully and be regardful of the interests of the employer during the term of their service, and carefully discharge their duties to the extent reasonably required. 35 Am. Jur. p. 514. Any employee may, of course, be lawfully discharged

for disobedience of the employer's directions, in breach of his contract. *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682; *N. L. R. B.* v. *Columbia Products Corp.* (2d Cir.), 141 F. (2d) 687." *NLRB* v. *Montgomery Ward & Co.*, 157 F. (2d) 486 at 496.

"The Act does not prohibit an effective discharge for repudiation by the employee of his agreement any more than it prohibits such discharge for a tort committed against the employer." *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332, 344.

The fact of employment implies the existence of a contract of employment, even if not written or express:

"Aside from any duties expressly imposed upon or undertaken by the employee in the contract of employment, the law imposes various obligations and undertakings by an employee in entering into a contract of employment. It implies an undertaking on his part that . . . he will *yield obedience to all reasonable rules, orders and instructions of the employer.* . . . The law implies an agreement on the part of the servant or employee to faithfully serve and *be regardful of the interest of his employer* during the term of his service, *carefully discharge his duty* to the extent reasonably required by the relation of employer and employee, . . ." 35 Am. Jur. 514, Sec. 82.

The Courts have had no hesitancy in holding that employees while still retaining the normal status as employees may be discharged for disobedience of the employer's directions.

"We do not question that an employer may discharge an employee who refuses to obey his instructions as to what part of the plant the employee shall occupy during the lunch hour as well as at other hours. *Industry demands order, and order demands discipline; any other principle would bring chaos.*" *NLRB* v. *Columbia Products Company*, 141 F. (2d) 687, 688.

For this reason attempts to change the terms of employment by refusing to observe those prescribed by the employer even when such disobedience and behavior is union-inspired, have consistently been held to constitute grounds for discharge.

> "*We are aware of no law or logic which gives the employee the right to work upon terms prescribed solely by him.* That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. . . . For the reasons stated, we think petitioner was within its rights in discharging the employees in question, and that their status as employees was thereby destroyed." *C. G. Conn, Ltd.* v. *NLRB* (7th Cir.), 108 F. (2d) 390, 397-398.

In *NLRB* v. *Condenser Corp.* (3rd Cir.), 128 F. (2d) 67, the discharge of employees who stood idle at their benches in support of a wage demand was held to be valid:

> "We do not think that under the circumstances the statute prevents their discharge." 128 F. (2d) at p. 77.

The same conclusion was reached in *NLRB* v. *Mt. Clemens Pottery Co.* (6th Cir.), 147 F. (2d) 262, 267, where a Board order of reinstatement was set aside as to three men who refused to work overtime, and left their jobs before the close of the working day fixed by the employer.

This court in *NLRB* v. *Fansteel Corp.*, 306 U. S. 240, at 255, said:

> "We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining

without restraint or coercion. To assure that protection, the employer is not permitted to discharge an employee because of union activity or agitation for collective bargaining. The conduct thus protected is lawful conduct."

"Since these employees were lawfully discharged, they did not remain employees. Sec. 2(3), National Labor Relations Act, 29 U. S. C. A. § 152(3). They were therefore not entitled to reinstatement to their former positions. *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599; *Loveman, Joseph & Loeb* v. *N. L. R. B.* (5th Cir.), 146 F. (2d) 769; *C. G. Conn, Ltd.* v. *N. L. R. B.*, supra; *N. L. R. B.* v. *Mt. Clemens Pottery Co.*, supra. The Board was in error in holding that by refusing to process the Chicago orders these employees engaged in lawful assistance of their union, protected by Section 7 of the Act. They were not on a strike; they did not leave the premises nor the employment. There being an implied obligation on the part of the employees to obey the reasonable instructions of the employer while the employment continued, their refusal to do so was proper ground for their discharge, and having been properly discharged there was no duty on the part of respondent to reinstate them. *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, supra; *Loveman, Joseph & Loeb* v. *N. L. R. B.*, supra."

Many of the above cases involve questions where employees were discharged either during or after a strike. If such discharges are lawful, then, *a fortiori,* discharge before a strike would be lawful.

Failure of employees to produce their share for any cause is recognized by both unions and management as a good and sufficient reason for discharge, and that right is only questioned by the National Labor Relations Board when it finds it necessary to hold such discharges discriminatory practices by the employer, so that such employer may be completely shackled in his subsequent labor relations. This

case is a glaring example of the Board's arbitrary, unreasonable and unsupported finding of discriminatory practice. The Board finding attempts to by-pass the real causes for discharging the three men by stating that if they were unsatisfactory employees they should have been discharged at an earlier date.

The question as to proper discipline is a matter for the decision of the management in its discretion, and "the measure of the discipline is not the proper concern either of the Board or of this Court." *Wyman-Gordon Co.* v. *NLRB,* 153 F. (2d) 480.

> "Howse seems to have been harsh in not allowing correction on the employee's time, but the harshness of the discharge is not the question. The question is whether there is substantial evidence that it was done because they were union men. *We think the evidence insufficient to override the sworn denials.*" *NLRB* v. *Tex-O-Kan Flour Mills Co.* (5th Cir.), 122 F. (2d) 433, 441.

Fragmentary and unrelated suspicions are not sufficient in substance to transform a proper exercise of discharge into an improper one. *American Smelting & Refining Co.* v. *NLRB* (8th Cir.), 126 F. (2d) 680; *NLRB* v. *Sheboygan Chair Co.* (7th Cir.), 125 F. (2d) 436.

> "The Board should not discard the positive credible testimony of witnesses in favor of an inference drawn from tenuous circumstances that at best could have supported only an anemic suspicion. Such an inference does not meet the test of substantial evidence. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126; *Appalachian Electric Power Company* v. *National Labor Relations Board* (4th Cir.), 93 F. (2d) 985, 989; *National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Corporation* (4 Cir.), 109 F. (2d) 128, 130; *Martel Mills Corp.* v. *National Labor Relations Board* (4 Cir.), 114 F. (2d) 624, 627, 628." *NLRB* v. *Sheboygan Chair Co.* (7 Cir.), 125 F. (2d) 436.

B. The Slowdown in Production Was Caused by Hughes and Eiler along with Staley

The slowdown in production at Petitioner's plant started in the middle of June and was at a peak by the fourteenth of August when the three men were discharged. At that time there was a nation-wide manpower shortage (Sidney, Ohio, was a restricted labor area, R. 243), and any employer, including petitioner, was reluctant to discharge employees. Rather than condemning petitioners for attempting to make a determination as to who should be discharged, petitioners should be commended for tolerating the situation as long as they did. Here the employer wanted to and did determine conclusively the merit of the discharges before they were made. Such a determination cannot be made over night, and Mr. Hughes particularly was warned that he was slowing down production and disciplinary action was taken in connection with the warnings. Other than to slow down even more, Hughes paid no attention to the warning and reprimand (fully discussed at Point VI herein). Mr. Eiler had the worst absentee record in the plant (R. 256) (Point V herein). Mr. Staley was disturbing his fellow workers by his loud arguments (Point IV herein). So that when these three men left their jobs to go to another part of the plant (this was the occasion but not the cause for discharge, as shown later herein), where a dispute was in progress, the management rightly felt that the time had come to correct the cause of slack production.

The evidence clearly shows that when the new men were trained to do the job, production got back to normal (R. 250, 251, Ex. 4, R. 407). Conversely to the production record of slowdown, the production record of increase proves the point that the three, for separate reasons, were the cause. In other words, since a bus is a large item to produce, the ultimate effect of a slowdown takes time, likewise

the ultimate effect of an increase takes time, but Exhibit 4 (R. 407) shows both the slowdown and the result after the new set-up men were trained.

It is important to note that both Hughes and Eiler reluctantly admitted that they knew that there was a slowdown of production in the Beck plant during the months in question (R. 106, 107, 161).

The Intermediate Report (R. 28), adopted by the Board as its findings, finds: "Mr. Beck attributed no responsibility (for low production) to other assemblers, notwithstanding the fact there were approximately ten others." A careful study of the Report discloses that this is one of the bases for finding Petitioners guilty of unfair labor practices against Hughes and Eiler, although these two men were the set-up men on the "bucks" whose work had to be done first and was holding up subsequent operations of the other men (R. 298, 354). It is inconceivable that a conclusion of unfair labor practice against these two employees could be premised upon the fact that no blame for the slowdown of production was placed on other assemblers who performed later work and particularly when there is no evidence by the Board or otherwise that any others than the three discharged men caused the slowdown in production. We especially point this out to show the extreme limit to which the Board was driven to find against the Company by making improper inferences. Is an employer guilty of an unfair labor practice because he picks out the men responsible for the slowdown in production and is he likewise guilty when he finds that the slowdown is in the assembly line at the front of two assemblers? (R. 298.) Certainly the answer in each instance is NO.

C. Work on the Wrecked Bus Did Not Cause Low Production

The Board in its findings, attempted to attribute slack production to work on a wrecked bus and the fact that July was a short work month (R. 29). Such findings were based upon inferences when the evidence is clearly to the contrary. The evidence is clear and undisputed that the work on the wrecked bus was done by the employees at off times, so as not to interfere in any way with their regular production schedules (R. 251, 317), and that repair work was *not* done on the bucks or jigs of the assembly line (R. 316). Both Hughes and Eiler were the only witnesses who even attempted to attribute slackened production to the wrecked bus and no witness attempted to attribute it to a short month. As to the short month, the evidence is undisputed that in January the company employed approximately 59 employees, in June it employed 72 employees, and on July 6th, 76 employees (R. 266). There is no evidence that anyone quit or was discharged prior to August 14th. As to the wrecked bus, again the record is undisputed that there was another wrecked bus in the plant during April and May (R. 256) when production was at the highest point attained during the entire year (R. 407). Likewise there was a wrecked bus in the plant during November and December of that year and it was in the plant at the time of the trial of the case (R. 251). During these months production was back to normal (R. 407). It is highly significant that Hughes, who attempted to attribute slack production to the wrecked bus and indicated that they had worked on the same without being able to specify any dates (R. 118), spent absolutely no time on the wrecked bus during June, July, or August (R. 352),

> "Q. Now, have you looked up the records to find out whether Mr. Hughes did any work on them?
>
> "A. He had no time on that job during the time it was in the plant."

although on direct examination he testified (R. 119),

> "Q. Did you work on one of those wrecked buses?
> "A. Yes, once in a while I would put a few hours on it.
> "Q. How many hours altogether, would you say?
> "A. Well, I put in about thirty hours on that one job, to the best of my knowledge."

Eiler, the other complainant, spent seven and one-half hours during three days of June on the wrecked bus, but absolutely no time during July and August (R. 352, 353). These facts are undisputed from the work records of the company.

The testimony of Mr. Beck that the work on the wrecked bus did not hold up production is substantiated by Mr. Hughes who testified on direct examination (R. 119),

> "Q. What wreck are you speaking of?
> "A. Well, there was a bus that had been wrecked and it was pulled in there and it set in there for about two months.
> "Q. What was done with it, if anything?
> "A. Well, just now and then, why, somebody would work on it a little bit."

Thus it was proved and with no substantial evidence to the contrary, that there was a slowdown in production in the buck assembly department and that Hughes and Eiler, along with Staley, were responsible. The bottleneck of production throughout the entire plant was at this one location. After these three were discharged and after the new men hired to replace them were trained, production returned to normal. We will now discuss the three men individually and show the cause for their discharge.

IV. Although No Charge Was Filed on Account of Mr. Staley, He Was Discharged for Cause.

Although no charge was filed against the Company because of the discharge of Mr. Staley, the Board co-mingles this discharge in its attempt to find a general purpose on the part of Petitioners to defeat self-organization of the employees. Therefore, it is necessary to point out briefly the true facts from the record concerning Mr. Staley's discharge. He was a sheet metal paneler's helper (R. 250) who worked in the same production line with Hughes and Eiler. His work followed theirs in that the metal sheets were applied to the frame previously put together by Hughes and Eiler. His disruptive arguments disturbed the other workers in the department and thus slowed down production. He was a new man, having worked at the plant only about seven months before his discharge (R. 250).

The Intermediate Report finds that Staley was an *outstanding union supporter*, which was uncorroborated.

The testimony is clear that Staley was a disruptive element, by loudly arguing anything and everything at all times during working hours. He argued religion, politics, for and *against* the Union. As an example of his character (R. 339),

> "Q. How about Mr. Staley? Do you know him?
> "A. Well, I knew him, yes.
> "Q. Why are you laughing about Mr. Staley?
> "A. Well, of course, he is a great fellow to argue. He was for a fact, and he would argue agin the union and he would argue for it. And it didn't make any difference which side he would take, he would argue either way."

A Board witness, which the Board strongly "credits" with reference to other matters, had this to say about Staley (R. 201):

"A. Well, Staley—I never knew him before he started to work there. And after he worked there, I know he would argue either way.

"Q. Argue either way on any subject; is that what you mean?

"A. On any subject.

"Q. Now, was Staley a man who argued quietly or was he a vociferous, loud-mouthed sort of person?

"A. He was loud-mouthed."

and another Board witness testified (R. 134, 135):

"Q. What kind of man was Staley?

"A. Well, I don't know hardly how to describe him. He is quite a vociferous creature, I would say.

"Q. Was he rather argumentative?

"A. Yes, very loud.

"Q. Just give us your own word-picture, now, of Staley, will you?

"A. Well, he seemed to me he was extremely radical in his views, and very loud in his expression. That is about all I would have to say.

"Q. Did that have to do with solely union matters or other matters?

"A. It seemed to me it had to do with all matters."

A comparable situation was present in *NLRB* v. *Sheboygan Chair Company*, 125 F. (2d) 436, wherein the Court overruled the discriminatory discharge finding of the Board because the testimony showed that the discharged employee was a "squawker," at page 439, it stated:

"There is an abundance of undisputed evidence that Moegenberg was a chronic 'squawker' and 'squawked' to his fellow workmen repeatedly."

Each of the witnesses had his own way of describing Mr. Staley, but the net result was that his arguing disturbed other employees who were trying to work and was undesirable when production schedules had to be maintained. He was discharged *solely* because he disturbed his

fellow workers who were trying to maintain production and he was not discharged for union activity because he apparently was at times "agin" the Union. In any event, the Board could have filed charges for Mr. Staley and the only proper inference is that the Board felt it could not make out a case on Mr. Staley. To join Staley as part of the "general purpose to defeat self-organization" is wholly unjustified and highly improper.

V. Mr. Eiler Was Not Active in the Union and Was Discharged for Good and Sufficient Cause, To-wit: Absenteeism.

William Clifford Eiler, one of the complainants, and one of those whom the Board ordered reinstated with back pay, was not a union leader nor was he active in the union.

While the Board, of necessity, found that he was an active union leader, the contrary is true, as admitted by Eiler himself. Notwithstanding the Board's finding, all of the witnesses agreed that this was not a fact.

(R. 339, Mr. Frankenburg):

"Q. How about Mr. Eiler? Was he ever a leader of the union or any organizer or anything like that, to your knowledge?

"A. No, I don't think he was."

(R. 375, Mr. Gibbs):

"Q. Now, with reference to Mr. Eiler, just tell the Board whether or not Mr. Eiler was a leader of the Union, or just an ordinary member.

"A. I would say he was not.

"Q. Not what?

"A. Active in the union, that is, he had never said anything to me in that regard."

(R. 381, Mr. Snider):

> "A. Well, Mr. Eiler never approached me on the subject. And so far as I know, he was no active member."

One of the Board's witnesses testified (R. 141, Mr. King):

> "A. I didn't even know he was a member of the Union."

and Mr. Beck did not know he was even a union member (R. 248):

> "Q. Well, now, was Eiler, as far as you know, an active union man, a committeeman, or anything like that?
>
> "A. No, sir. I had never had Eiler's name mentioned to me as far as I know."

At least two Circuit Courts have passed upon the question where the employer did not know the discharged employee was a member of the union.

> "Howse testified that the discharge was for Mitchell's conduct about the bags and nothing else, and that he did not know Mitchell was a union man." *NLRB* v. *Tex-O-Kan Flour Mills Co.* (5th Cir.), 122 F. (2d) 433 at 442.

> "When honorable men, wholly unimpeached, testify under oath to their reasons for discharging a man and such reasons are supported by all the evidence in the case and are not in any way connected with the discharged employee's union activities, the Board is not justified in discarding all this evidence and finding the employer guilty of an unfair labor practice based upon a sequence of three or four unrelated events." *NLRB* v. *Sheboygan Chair Co.*, 125 F. (2d) 436, 439.

If the foregoing had been disputed by Mr. Eiler, there would be a possibility of the Board "crediting" his testi-

mony, but Mr. Eiler himself testified on direct examination (R. 149),

> "Q. Did you become active in any way in the union?
> "A. No, not just personally."

Since Mr. Eiler was only a member of the union like anyone else, it cannot properly be found, as was done by the Board, that he was a leader and fired as such.

The union activities of Eiler were not sufficient in themselves to support an inference that they were the cause of his discharge. In *NLRB* v. *Citizens-News Co.* (9th Cir.), 134 F. (2d) 970, 974, referring to this principle, it is said:

> "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities. There must be more than this to constitute substantial evidence."

The fact that Eiler was not active in the union is particularly significant because it shows that the management was trying to find the cause of the slowdown of the production and paid no attention to the question of union activity.

Therefore, the proof of the cause of discharge has full weight. *The cause of discharge was absenteeism.* It was well known during the War that absenteeism was one of the great troubles impeding progress of war production. The government took all kinds of action to curtail absenteeism. The Selective Service System required employers to report absenteeism on all ninety day reports (Form 42) requesting the deferment of employees from the draft, and Draft Boards were instructed to ignore requests for deferment when the record showed chronic absenteeism. That was the most drastic action that could have been taken.

As the only side set-up man Mr. Eiler had a key position in the assembly line. When he was off there was no one to take his place. This was one of the reasons why only three bucks were operated continuously instead of four as required to keep production up to normal (R. 257). *Eiler had the worst absentee record in the shop* (R. 256). He was off a half day to two days a week (R. 345). Eiler admitted that he was off a great deal, but claimed it was partly because of his eyesight (R. 156).

> "Q. And, as I understand it, your excuse for your frequent absences from work was your eyes; is that it?
> "A. That was some of the time, yes."

However, he admitted upon cross-examination that two or three months previous to his discharge he purchased goggles to protect his eyes from the welding light. It was not shown that any of the other workmen wore goggles, although they were equally as close to the welders' light as was Mr. Eiler. *No other employee had such an absentee record.* Even though he was off because of his eyes, that did not prevent the management from replacing him with an able workman. War production could not be held up because of the infirmity of one man. Clearly the Army could not excuse delays in delivery of critical materials because the management claimed an employee was physically unable to do his share of the production work.

> "Against this overwhelming evidence indicating that the reason for the discharge of Richards was that assigned by the manager, the record contains only the following: Richards' denial that he had been drinking regularly or was drunk on the occasion immediately preceding his discharge; evidence that Richards was an active union member and that his membership might reasonably have been known by the management; and the background of the hostile attitude of the companies toward the union. . . . We think the record is without

sufficient evidence to support the findings that Richards was discharged because of his union activity." *NLRB* v. *Dixie Motor Coach Corp.* (5th Cir.), 128 F. (2d) 201, 203.

Since Eiler was admittedly not a union leader, and since he undisputedly had the worst absentee record in the plant, we submit that there is no substantial evidence to justify the Board's findings that he should be reinstated to his job, with back pay, that he was discharged for union activity, and that his discharge was part of the general purpose to defeat self-organization. *Even the Board was driven to find in its Intermediate Report "It is evident that Eiler was frequently absent, a practice that had extended over several months"* (R. 29).

Board's witness, Kuck, whom the Board "credits" strongly, as to other matters, had this to say about Eiler (R. 201):

> "Q. Do you know anything about whether Eiler was a steady worker, there every day, or whether he was absent a great deal from the plant?
>
> "A. He was absent quite a bit."

> "If no other reason is apparent, union membership may logically be inferred. . . . *But it remains true that the discharger knows the real cause of discharge; it is a fact to which he may swear. If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying.*" *NLRB* v. *Tex-O-Kan Flour Mills Co.* (5th Cir.), 122 F. (2d) 433, 438-439.

We submit that Mr. Eiler could not have been discharged because of union activity because he was not an active union man. Therefore, his absentee record standing undisputed is a good and sufficient, as well as legal cause for

discharge, and that the Board in ordering him reinstated with back pay, did so erroneously, and that the court below in finding, without any comment whatever, that the "discriminatory discharge" was sustained by the evidence, is contrary to all the evidence and to the law and that the court below should be reversed.

VI. Mr. Hughes Deliberately Slowed Down Production, Therefore His Discharge Was for Good Cause.

John Taylor Hughes, the other complainant, whom the Board ordered reinstated with back pay, had been employed by the company for several years. He, as set-up man, worked on the assembly line. He set up the back panel and the top. Long prior to union activity in the plant and after a nine weeks' illness in 1943, he was given a four-cent per hour cut in pay. Prior to his illness, he had been receiving 84¢ while the other assemblers were receiving only 80¢, although they were doing the same work as Hughes [Mr. Eiler was one of those receiving 80¢ and claimed that he was doing as good work as Hughes (R. 369)]. The War Labor Board then having jurisdiction over all wage matters had refused to permit an increase of the other assemblers to 84¢, therefore it was necessary to cut Hughes to the rate of his job classification or lose all of the other assemblers.

A rate cut is not easy to take and Mr. Beck did not expect Hughes to take it with good grace, and told him (R. 245),

> "At the time I done it, I told him that if I had to take the cut I would quit rather than take it.
>
> "Q. Did he quit?
>
> "A. No, he didn't. I told him that it was a case where six or seven men had stated that they would leave the job, or we would change their rates to Hughes', or bring his rate down to theirs, because they were as good or better than Hughes. There was only

one thing to do. It was a matter of seven men against one. And I reduced Hughes' rate four cents an hour.

"At the same time, as I say, I told him that if I had to take it, I would quit, and if he wanted his separation report—and they are not so easily gotten, I would give him his immediately.

"Q. That was in what year?

"A. That was in August, 1943. I also told him that I thought we could make it up to him if he wanted to stay, because I had this Form 10 pending (before WLB), and that if he wanted to stay, as soon as that was received that he would probably get his cut back and possibly more, I didn't know.

"Q. And did he get his cut back and more?

"A. On October 2, (1943), he got his—he was raised back to 85¢ an hour."

At that time there was undisputedly no union activity in the plant. This started in June, 1944. Although Hughes took the pay cut, and even though he was thereafter raised with the other assemblers to 85¢ (one cent more than he received before the cut), he was never satisfied and continued as a disgruntled employee.

So that in June, 1944, he became an active union organizer and was all over the plant trying to get members on company time (R. 246). On July 3d, he was reprimanded by Mr. Beck for his activity during working hours, and he stated to Mr. Beck that he knew he should not do it because Mr. Tull (union organizer) had so advised him (R. 246). He was further told about his slowing down production, which was another reason for the reprimand and the disciplinary action (R. 101, 109).

That such a reprimand, for solicitation on company time, is proper, can scarcely be questioned. *Rep. Aviation Corp.* v. *NLRB,* 324 U. S. 793; *NLRB* v. *May Dept. Stores Co.* (8 Cir.), 154 F. (2d) 533; *NLRB* v. *J. L. Brandeis & Sons,* 145 F. (2d) 556; *NLRB* v. *Edinburg Citrus Assn.* (5th Cir.), 147 F. (2d) 353.

On July 3rd affirmative action was taken to prevent further improper use of company's time which was holding up the production, to-wit, withholding of vacation pay. Mr. Hughes admitted that at that time he was told that the withholding of vacation pay was due to his holding up the line (R. 101):

> "Q. And the reason for it up to that time was because you were holding up the line, wasn't it?
> "A. That is what they said."

From that time on Mr. Hughes did only such work as he had to do to get by. It was well known to his fellow employees that he was holding down production and he said to his fellow employees (R. 338):

> "He said he wasn't going to put out any more work than just what he had to put out."

Another witness (R. 367):

> "A. Well, he said he didn't intend to do any more than he had to since they hadn't given him his bonus (vacation) money.
> "Q. How many times did he tell you that, if more than once?
> "A. Oh, I would say, two or three times."

The Board could not, in this instance, find that Mr. Hughes was not reprimanded for "holding up the line," therefore held that the reprimands were discriminatory.[6]

Neither could Hughes complain that he was not warned of "holding up the line" because on the occasion of the

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[6] In repeated decisions of the Board they have criticized the discharge of employees without prior warning of the employee's faults. Now, when an employee is warned, as was Hughes, the Board finds that such action was a part of a general purpose to defeat the union.

first reprimand in July he admitted that Mr. Beck told him that he was "holding-up the line." Hughes (R. 90):

> "Q. What did they say?
> "A. They said I was holding up the line."

He again admitted it (R. 100, 101, 109, 112, 120), and he admitted that when he was discharged he was told that it was because of his "holding up the line."

Hughes (R. 97):

> "A. The only thing; he said that I was holding up the line."

He knew that production was off and admitted that Mr. Beck discussed this production problem in his speech (R. 106, 107). Furthermore he knew about Col. Lynn's telegram pleading with the employees to restore normal production, but he deliberately continued to do as little work as he thought would get by. The Board, in its findings, attempts to make much of the fact that Hughes was not discharged until August 14th, when he, along with others, left their work to go to a dispute occuring in another department of the plant.

Shortly prior to Hughes' discharge, Mr. Beck had received Col. Lynn's telegram regarding production and had received the advice from the Ordnance Official, Mr. Dawson, as to the method to pursue if production continued down. The last act of August 14th (of leaving his job) was the "straw that broke the camel's back."

> "The record shows beyond all controversy that Baker's interference with production by union solicitation was the continuation of a long series of events of Baker's own making. The immediate cause of his discharge was merely the 'last straw which broke the camel's back.'" *Wyman-Gordon Co.* v. *NLRB* (7th Cir.), 153 F. (2d) 480, 487.

There is so contention now nor has there ever been, that had Hughes performed his share of the work he would have been discharged for going off the job with the other assemblers. Those assemblers who had worked satisfactorily were not discharged for leaving their jobs. The time had then come to correct the production difficulties and proper action was then taken.

The Board found that "shortly" (in fact it was four days, R. 169) before Hughes' discharge he was given a raise in wages and that therefore he must have been a satisfactory employee. The Board thereby completely ignores the fact that Hughes had to be given the raise because of the War Labor Board action (R. 169), and that he was given only a raise to the minimum approved for his job classification (85¢ to 88¢, R. 108), and was not given a raise to the maximum for his job classification, as was given others (R. 108). Even Hughes admitted that he was given only the minimum raise while others received the maximum (R. 108).

> "Q. And in August of 1944, there was another raise to you and employees similarly situated to 88¢, wasn't there?
> "A. Yes. A couple of us got 88¢.
> "Q. Well, there were a number of them?
> "A. Some of them got up to 95¢"

Therefore, under War Labor Board Regulations, Hughes got the minimum raise allowable, while other assemblers got up to the maximum. *That is neither proof nor a proper inference of his satisfactory work.*

> "The mere fact that he was given raises in compensation indicated a willingness on the part of respondent to continue with him as long as there were no further infractions of the rules of his employment for he admittedly had some good qualities. We repeat there was cause for his discharge and his employer

> exercised the right of discharge. Fragmentary and unrelated suspicions are not sufficient in substance to transform a proper exercise of discharge into an improper one. *American Smelting and Refining Co.* v. *NLRB* (8th Cir.), 126 F. (2d) 680; *NLRB* v. *Sheboygan Chair Co.* (7th Cir.), 125 F. (2d) 436." *NLRB* v. *Montgomery Ward & Co.* (8th Cir.), 157 F. (2d) 486, 491.

Another insight into Hughes' character can be shown from the evidence. On the same day he was discharged, he reported to the War Manpower Commission with his employer's release (R. 402). At the bottom of the form, under "Comment," there is the statement, "*When ready to return to work will come in.*" The evidence discloses that Sidney, Ohio, at that time was and continued to be a labor shortage area, and the plants located at Sidney were doing vital war work. Mr. Hughes claimed he was a skilled mechanic, but he admitted that following the loss of his job, he made no effort to obtain any other employment other than puttering around, doing miscellaneous cement work for people who were repairing their places (R. 122, 123). Now the Board orders him reinstated with back pay (subject to clarification as to his earnings).

There is no substantial evidence to support the findings of the Board that he was discharged in violation of the N. L. R. A. To the contrary, the evidence is clear and convincing that he was discharged for holding up production and had been previously advised accordingly but did nothing about it, and the Board should be reversed.

CONCLUSION

We submit that this Court should redefine "burden of proof" on the Board in finding discriminatory practices and find that substantial evidence means just that and not "insubstantial findings of fact screening reality." *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc.*, 312

U. S. 287, and that the court below in affirming the illegal discharges of Mr. Eiler and Mr. Hughes, should be reversed because there was no substantial evidence to support such an order.

We further submit that the right to freedom of speech guaranteed under the First Amendment of the Constitution, as applied to employer-employee relations under the National Labor Relations Act, should be redefined, so that the employer is not "wholly at the mercy of the varied understandings of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Thomas* v. *Collins,* 323 U. S. 516, and so that "subtleties may not be invoked as the basis for inference of coercive remarks which may have had an 'altered import' in the minds of the listeners and so that the employer would not be subjected to the chance of what the Board might infer." *NLRB* v. *Montgomery Ward & Co.,* 157 F. (2d) 486.

It is, therefore, respectfully submitted that this case is one calling for interpretation of Constitutional rights of great importance, certainly to one class of citizens, who have not been adequately protected heretofore, and that to such an end, a writ of certiorari should be granted, and this Court should review the decision of the court below and finally reverse it.

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